

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED ARTISTS THEATRE CIRCUIT, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
THE TOWNSHIP OF WARRINGTON, PA,	:	
GERALD B. ANDERSON, JOSEPH E. LAVIN,	:	
DOUGLAS E. SKINNER, WAYNE S. BULLOCK,	:	
and KATHARINE M. WATSON	:	No. 98-5556

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 15, 2001

Plaintiff United Artists Theater Circuit, Inc. ("UA") alleges that Warrington Township ("Township") and the individual members of the Warrington Township Board of Supervisors ("Board members") violated its right to substantive due process by arbitrarily subjecting their land development project to heightened scrutiny and intentionally delaying approval of the project in order to receive an "impact" fee from a competing developer. The individual Board members move for summary judgment based on qualified immunity. Each Board member's motion will be denied.

BACKGROUND¹

This action arises out of competing applications to develop multi-plex movie theaters in the Township. The Warrington

¹ As required in a motion for summary judgment, all facts are set forth in the light most favorable to the plaintiff as the non-moving party. See United States v. Diebold, Inc., 396 U.S. 654, 655 (1962).

Township Board of Supervisors ("Board") evaluates all proposals to develop land in the Township to ensure compliance with the Township's zoning and land development ordinances. The review process consists of two phases, preliminary approval and final approval. P. Ex. A., at 86-91. At each phase, the plans for the proposed development must be reviewed by the Township Engineer ("Engineer") and the Township's Planning Commission ("Commission") before the Board votes on whether to grant the requested approval. P. Ex. A., at 86-88.

In 1995, Warrington's Board became aware that numerous movie theater chains were interested in opening theaters in the Township. P. Ex. B., at 36-37; 60-62. Although the Board members knew they could neither collect an amusement tax from these theaters, nor require them to pay an "impact" fee,² P. Ex. A, at 46, they determined it was "critical . . . [to] try to get some impact fee or amusement taxes from these movies." P. Ex. B., at 53.

In January, 1996, UA submitted to the Board for approval a proposal to build a multi-plex movie theater and entertainment

² An impact fee is a charge assessed by a municipality on a developer in order to fund the costs of improvements or services necessitated by and attributable to new development but otherwise borne by the municipality. The term is placed in quotations because there is question as to whether this fee was intended to repay the Township for expenditures necessitated by the development. See infra, n.7 and accompanying text.

complex in Warrington. P. Ex. 7. A year later, a competing developer, Bruce Goodman ("Goodman"), requested approval for a plan to build a multi-plex theater and retail center on a plot of land adjacent to UA's proposed theater site. P. Ex. 6; 12.

The Board asked each developer to contribute voluntarily an "impact" fee to the Township. Goodman immediately offered to pay the Township \$100,000 per year. P. Ex. B, at 49-51. UA resisted paying the requested fee. P. Ex. A., at 33-34 & 36; P. Ex. 21-23.

The Board unanimously voted to grant preliminary approval to the Goodman project on February 4, 1997, one month after the submission of the initial application. P. Ex. 13 & 2. Goodman applied for final approval of his project in the spring of 1997, and the Board granted final approval on May 21, 1997. P. Ex. 27 & 3.

UA was not granted preliminary approval until March 18, 1997, fourteen months after submitting its initial application. P. Ex. 34 & 6. A short time thereafter, UA applied for final approval. P. Ex. 20. Although the Commission recommended that final approval be granted, P. Ex. 40, the Board tabled its vote on final approval three times, each time asking if UA would be willing to pay an "impact" fee. P. Ex. 21-23. The Board granted final approval on September 16, 1997, after UA guaranteed the Township would collect \$25,000 in revenue from the project

annually. P. Ex. 24. In granting final approval, the Board voted to alter some of the conditions to approval, making it more difficult for UA to begin building its theater.³ P. Ex. 1.

Goodman's project was completed in 1999. UA never built a theater in Warrington Township.

PROCEDURAL HISTORY

UA's complaint alleged that the Board members' actions with regard to its development proposal were unconstitutional. UA asserted claims against the Township and each member of the Board for violations of: (1) Procedural Due Process; (2) Substantive Due Process; and (3) Article I, § 13 of the Pennsylvania Constitution. UA also asserted claims of civil conspiracy and abuse of process against the Board members. By Order dated January 22, 1999, the court severed and stayed the state law claims pending resolution of the federal constitutional claims.

Defendants filed a motion for summary judgment. The court, finding the procedural protections provided to UA adequate, granted summary judgment on the procedural due process claim. See Order, Dec. 7, 1999. The court denied summary judgment on the substantive due process claim because plaintiff produced

³ The resolution granting preliminary approval required UA to acquire the right-of-ways necessary to make agreed upon road improvements prior to receiving an occupancy permit, i.e., before UA could open its theater. P. Ex. 6. The resolution granting final approval required UA to acquire these right-of-ways prior to receiving a building permit, i.e., before UA could begin construction of the theater. P. Ex. 1.

evidence from which a reasonable factfinder could conclude defendants acted with improper motive. See Order, Dec. 7, 1999.

The Board members argued they were entitled to qualified immunity on the substantive due process claim. The court found that if UA's allegations were proved, the Board members' actions violated clearly established substantive due process rights of which reasonable public officials would have been aware. See Order, Dec. 7, 1999. Their motion for judgment based on qualified immunity was denied. See Order, Dec. 7, 1999. The Board members appealed this decision.

The Court of Appeals held that "the District Court properly analyzed the supervisors' request for qualified immunity on summary judgment." The court noted, however, that under Grant v. City of Pittsburgh, 98 F.3d 116, 126 (3d Cir. 1996), "the District Court should have considered each supervisor's request for qualified immunity individually rather than as a group." The Court of Appeals remanded the matter for this court "to address each supervisor's request for immunity on an individual basis or explain why the supervisors should be considered collectively."

DISCUSSION

"Government officials performing discretionary functions generally are shielded from liability for civil damages" by qualified immunity. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The immunity applies so long as "their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. It is the defendant's burden to establish entitlement to qualified immunity. See Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989). A court considering a claim of qualified immunity must determine: (1) whether the actions of the defendant violated a constitutional right; and, if so, (2) whether the right was clearly established at the time plaintiff alleges the violation. See Saucier v. Katz, - U.S. -, 121 S.Ct. 2151, 2155-56 (2001).⁴

I. Addressing the Board of Supervisors as a Whole

Generally a court must address the claim of qualified immunity of each defendant individually. See Grant v. City of Pittsburgh, 98 F.3d 116, 120 (3d Cir. 1996). However, here the Board members speak of themselves as a group, and speak of their actions as taken collectively. See, e.g., P. Ex. A, at 62; P. Ex. B, at 53. According to the Board members, they discussed all aspects of the applications to develop land, and made decisions as a group. Each of Board's decisions on the two theater projects was unanimously agreed upon by all Board members

⁴ The Supreme Court decided the case of Saucier v. Katz after the Court of Appeals' decision in this action. Saucier clarified the approach a court must use to address a claim of qualified immunity. Accordingly, the court will elaborate upon its previous decision not only to address the issues raised by the Court of Appeals, but also to demonstrate conformance with the Court's directives in Saucier.

present, and the feelings of those absent generally were known to accord with the vote. See, e.g., P. Ex. C., at 59-60 (the Chairman routinely gets input from members who will be absent); see also, P. Ex. D., at 22-23; P. Ex. E. at 50. The Board members each took the same actions with regard to the theater projects. See infra., at II(A)&(B).

The Board members are represented by the same counsel, and their counsel addresses them as a group. See, e.g., Mtn. for Summ. J. Their original motion for summary judgment addressed their entitlement to qualified immunity as a group, see id., and the amended motion for summary judgment based on qualified immunity largely does the same. See Amended Mtn. for Summ. J.

The court finds it appropriate, under these circumstances, to address qualified immunity of the Board as a whole. Nonetheless, to avoid any further unnecessary delay in this litigation, the court will also address the issue of qualified immunity as to each Board member individually to the extent possible.

II. Adequately Demonstrating a Constitutional Violation

The first prong of the qualified immunity test requires the court to determine whether plaintiff has adequately alleged a constitutional violation. Here the court addresses this question in the context of a motion for summary judgment, and must thus determine whether plaintiff has shown a constitutional violation

by using the summary judgment standard. See Grant, 98 F.3d 120-121.

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to survive a motion for summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court must determine whether the evidence offered by the non-moving party is sufficient to support a rational trier of fact finding for that party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). All evidence presented by the non-moving party is to be believed, and "[a]ll justifiable inferences are to be drawn in [that party's] favor." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). So, to survive the first prong of the qualified immunity standard, UA must provide evidence from which a factfinder could conclude that the defendants violated its right to substantive due process.

To establish a violation of substantive due process under 42 U.S.C. § 1983, UA must demonstrate it was deprived of a protected property interest by the actions of a government official and that the actions of the official were either: (1) not rationally

related to a legitimate government interest; or (2) motivated by bias, bad faith, or improper motives.⁵ See Parkway Garage v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993). Defendants do not dispute that plaintiff had a property interest protected by due process, nor do they claim they are not government officials.

A. The Evidence of Improper Motive: The Board as a Whole

UA provided evidence that: (1) the Board had a strong desire

⁵ In its opinion, the Court of Appeals noted that it sua sponte raised, at oral argument, the question of whether the "shocks the conscience" standard adopted by the Supreme Court in County of Sacramento v. Lewis, 523 U.S. 833 (1998) applies to substantive due process claims in the land-use context. The court then declined to address that question. The defendants now urge this court to find that the improper motive standard has been superceded and apply the standard articulated in Lewis.

First, this court observes few differences between the Lewis standard and the improper motive standard. The Supreme Court adopted the shocks the conscience standard in order to emphasize that only "the most egregious executive action can be said to be arbitrary in the constitutional sense." Lewis, 523 U.S. at 846. Similarly in applying the improper motive standard, the Court of Appeals has emphasized that to be constitutionally improper, the motive must be inappropriate, not simply in excess of the defendant's authority. See Samerica Corp. v. City of Philadelphia, 142 F.3d 582, 594 (3d Cir. 1998). The motives that the Court of Appeals has found inappropriate include economic interest and political gain. See Bello v. Walker, 840 F.2d 1124, 1129-30 (3d Cir. 1988); Grant, 98 F.3d at 119. This Court believes that arbitrary use of power by a governmental official for economic or political gain would similarly shock the conscience.

Second, after the Supreme Court decided Lewis, the Court of Appeals continued to apply the improper motive standard to determine whether a party's substantive due process rights have been violated in land-use disputes. See, e.g., Woodwind Estates v. Gretkowski, 205 F.3d 118, 122-25 (3d Cir. 2000). For these reasons, the court finds it appropriate to have utilized the improper motive standard.

to obtain an "impact" fee or otherwise generate revenue for the Township from the movie theaters; (2) Goodman immediately complied with the Board's request to pay a fee; and (3) UA resisted the Board's request to volunteer a fee. Goodman's project plans were reviewed far less and approved much faster than UA's plans.⁶ From this evidence, a factfinder could conclude that the UA project was held to a higher standard of scrutiny than the Goodman project, and infer that the Board members' treatment of UA was motivated by their desire to receive the "impact" fee offered by Goodman. See Davis v. Township of Hillside, 190 F.3d 167, 174 (3d Cir. 1999) ("There is often no way to establish subjective intent, other than by a reasonable factfinder's common sense evaluation of the circumstances"); see also Parkway Garage, 5 F.3d at 698 (the plaintiff must demonstrate only that there "was sufficient evidence from which the jury reasonably could [find]" that defendants actions were motivated by an improper consideration).

Plaintiff also proffers evidence from which a factfinder could conclude that paying the so-called voluntary impact fee was a quid pro quo for favorable treatment from the Township. At the

⁶ The UA project was addressed at a total of eight meetings prior to the Board's granting final approval; the Goodman plan was addressed at only four meetings. The Goodman project was approved within six months of its initial application; the UA project was not approved for twenty months after the submission of its initial plans.

same time he was seeking Board approval for his project, Goodman, a general developer, was negotiating with Regal Cinemas, a movie theater chain, to rent the theater space in his development project. Goodman discussed the Board's request that the project contribute an impact fee with Regal. Keith Thompson, a Senior Vice President of Regal Cinemas, wrote to Goodman about whether they were willing to pay the fee requested. The letter stated: "We are not thrilled with the idea of paying an admission tax to the township. We need to understand what we will be provided should Regal go along with this suggestion." P. Ex. 52. Goodman then agreed to pay the \$100,000 "impact" fee, and Regal rented the theater space in the Goodman project. A reasonable factfinder could infer that Regal was assured it would receive favorable treatment from the Township in exchange for payment of the fee.

Defendants claim that Goodman received approval faster because there were less problems with his proposed project's plans. This contention is insufficient to justify the entry of summary judgment. Even assuming that plaintiff agreed that Goodman's project had less technical problems, whether this legitimate reason or the improper monetary reason actually motivated the defendants would remain a disputed question of material fact requiring a trial. See Woodwind Estates v. Gretkowski, 205 F.3d 118, 124 (3d Cir. 2000); Thornbury Noble,

Ltd. v. Thornbury Township, No. 99-6460, 2000 U.S. Dist. LEXIS 13474, * 6-7 (E.D. Pa. Sept. 20, 2000)(O'Neill, J.).

Plaintiff also offers evidence from which a factfinder could conclude that defendants' legitimate reason is pretextual. Goodman's project was granted final approval despite the Engineer's concerns that: (1) Goodman had not submitted a revised traffic impact study as requested; and (2) the project's stormwater management plan was incomplete and "require[d] further clarification by the applicant's engineer." P. Ex. 37. In contrast, the Engineer's letter reviewing UA's final plans noted fewer outstanding issues. P. Ex. 36.

The defendants claim that no factfinder could conclude they had an improper motive, even if they treated the two projects differently, because the Board was not aware that there was a competition between the two projects. They point to a newspaper article in which a UA representative stated the company planned to build its theater even if another multi-plex was built across the street. D. Ex. JJ. But there is testimony from which a factfinder could conclude that the Board knew, despite the public assertions of the plaintiff to the contrary, that no more than one theater would be completed. P. Ex. B, at 90 ("[A]ll the movie theaters made it known that they'd probably like to be first but flat out said that that didn't matter because they were going to build anyway and we at the Board found that hard to

believe.") (emphasis added).

The Court of Appeals sua sponte raised the question of whether the Board's actions could constitute a substantive due process violation in light of the Pennsylvania Municipalities Planning Code which permits a municipality to impose impact fees after adoption of an enabling ordinance. See 53 Pa. Const. Stat. Ann. § 10503-A(a). At the time of these events, Warrington Township's Board had not enacted an ordinance enabling it to impose an impact fee on developers, see P. Ex. A., at 46, and the statute specifically provides that "[n]o municipality may levy an impact fee prior to the enactment of a municipal impact fee ordinance." 53 Pa. Const. Stat. Ann. § 10503-A(c). Additionally, the statute cited explicitly states that any fee imposed must be "specifically authorized under the act." 53 Pa. Const. Stat. Ann. § 10503-A(b). The act curtails the discretion accorded municipalities in levying impact fees by tying power to levy and the amount of the fee to a specific improvement necessitated by and attributable to new development. See 53 Pa. Const. Stat. Ann. § 10503-A(d). In this case, the "impact" fee sought, and acquired from Goodman, was not tied to a particular improvement required because of his development. It was paid into the Township's general fund.⁷ The statute does not affect

⁷ The defendants claim the fee was intended to compensate the Township for increased use of emergency services and additional road maintenance expenses generated by the

the constitutionality of the defendants' actions.

Plaintiff has provided evidence permitting a factfinder to conclude the Board intentionally delayed approval of plaintiff's project because it wished to receive the impact fee offered by Goodman. If proved, the court believes the monetary motivation of the Board was improper and would constitute a violation of substantive due process.⁸ See Parkway Garage, 5 F.3d at 695-96 (economic motivation is improper and violates substantive due process); see also Blanche Road v. Bensalem Township, 57 F.3d 253, 269 (3d Cir. 1995).

B. The Evidence of Improper Motive: The Individual Board Members

1. Chairman Gerald Anderson:

Chairman Anderson was present for each of the meetings, formal and informal, at which Board members discussed the theater projects and impact fees. He knew that Goodman had offered to pay a \$100,000 impact fee and that UA was resisting paying an impact fee. P. Ex. 2 & P. Ex. 21. He was present as Supervisor

development. See, e.g., P. Ex. A., at 38-40. Plaintiff appears to claim that the development plans provided for the impact of the theater on the roads and that the property taxes paid by the development would adequately support an increased use of emergency services. See P. Ex. A., at 42-45. No evidence was presented in the record as to the cost of the alleged "impacts" on the Township.

⁸ The application of the "shocks the conscience" standard of Lewis v. County of Sacramento would not have altered the court's conclusion. The court believes that the Board's alleged conduct, if proved, would shock the conscience.

Lavin repeatedly requested that UA pay a fee, and UA expressed resistance.

He voted to approve the Goodman project preliminarily despite the Engineer's concerns with the plan. P. Ex. 13 & 30. He voted to grant final approval to the Goodman project despite continued engineering concerns and Goodman's failure to submit a revised traffic study as requested. P. Ex. 27 & 37.

Chairman Anderson voted three times to table the vote on final approval of the UA project while UA considered the question of the impact fee, although the Engineer's review of the plans suggested no major problems remained. P. Ex. 21-23 & 36.

A reasonable factfinder could conclude that Chairman Anderson subjected the UA project to heightened scrutiny and purposefully delayed the project's progression in order to obtain the impact fee offered by Goodman for the Township.

2. Supervisor Joseph Lavin:

Lavin was present at each of the meetings, formal and informal, at which Board members discussed the theater projects and impact fees. He knew that Goodman had offered to pay a \$100,000 impact fee and that UA was resisting paying any impact fee. P. Ex. 2 & P. Ex. 21.

He repeatedly requested that UA pay an impact fee.⁹ He

⁹ In all, Mr. Lavin asked UA to pay an impact fee approximately nine times at public meetings. He asked UA approximately six times before preliminary approval. P. Ex. A, at

continued making these requests despite UA having informed him it was not company policy to offer to pay such a fee. P. Ex. 22 & 23.

He voted to approve the Goodman project preliminarily despite the Engineer's concerns. P. Ex. 13 & 30. He voted to grant final approval to the Goodman project despite continued engineering concerns and Goodman's failure to submit a revised traffic study as requested. P. Ex. 27 & 37. Although the Engineer's review suggested no major problems remained with the UA's final plans, he voted three times to table the vote on final approval: each time he asked UA to consider paying the impact fee. P. Ex. 21-23 & 36.

A reasonable factfinder could conclude that Supervisor Lavin subjected the UA project to heightened scrutiny and purposefully delayed the project's progression in order to obtain the impact fee offered by Goodman for the Township.

3. Supervisor Wayne Bullock:

Supervisor Bullock was present at each of the formal meetings at which the Board addressed either the UA and Goodman projects and impact fees. He knew that Goodman had offered to

36. Thereafter, he asked UA about the fee at each Board meeting addressing final approval of its plan. P. Ex. 21-23. Finally, at the September 2, 1997 meeting of the Board, UA relented and offered to guarantee the Township would receive \$20,000 in revenue from the entertainment complex. P. Ex. A., at 23. These requests were made on behalf of the Board. See P. Ex. C., at 25-26.

pay a \$100,000 impact fee and that UA was resisting paying any impact fee. P. Ex. 2 & 21. He was present as Supervisor Lavin requested that UA pay the fee, even after UA stated it was not its corporate policy to do so. P. Ex. 22.

He voted to approve the Goodman project preliminarily despite the Engineer's concerns. P. Ex. 13 & 30. He voted to grant final approval to the Goodman project despite continuing engineering concerns and Goodman's failure to submit a revised traffic study. P. Ex. 27 & 37. At the same time, Supervisor Bullock voted three times to table the vote on final approval of the UA project while UA considered the question of the impact fee, although the Engineer's review of the final plans suggested no major problems remained. P. Ex. 21-23 & 36.

A reasonable factfinder could conclude that Supervisor Bullock subjected the UA project to heightened scrutiny and purposefully delayed the project's progression in order to obtain the impact fee offered by Goodman for the Township.

4. Supervisor Katharine Watson:

Supervisor Watson was present at each of the formal meetings at which Board members addressed the theater projects and the issue of impact fees, except the meeting at which final approval was granted to the Goodman project. She knew that Goodman had offered to pay a \$100,000 impact fee and that UA was resisting paying any impact fee. P. Ex. 2 & P. Ex. 21.

Supervisor Watson voted to approve the Goodman project preliminarily despite the Engineer's concerns. P. Ex. 13 & 30. Although she was not present when final approval was granted to the Goodman project, P. Ex. 27, she supported that decision and signed the resolution granting approval despite the Engineer's concerns and Goodman's failure to submit a revised traffic study in accordance with the Engineer's request. P. Ex. 3 & 37. She then voted three times to table the vote on final approval of the UA project while UA considered the question of the impact fee, although the Engineer's review of UA's plans suggested no major problems remained. P. Ex. 21-23 & 36.

A reasonable factfinder could conclude that Supervisor Watson subjected the UA project to heightened scrutiny and purposefully delayed the project's progression in order to obtain the impact fee offered by Goodman for the Township.

5. Supervisor Douglas Skinner:

Supervisor Skinner was absent for three of meetings at which one or both of the proposed theater projects were discussed, but Chairman Anderson sought his opinion on the items for discussion in advance. P. Ex. C., at 59-60. Supervisor Skinner knew that Goodman had offered to pay a \$100,000 impact fee and that UA was resisting paying any impact fee. P. Ex. 2 & P. Ex. 21. He was present for many of the meetings at which Lavin repeatedly requested that UA pay the fee. He voted to approve the Goodman

project preliminarily despite the Engineer's concerns. P. Ex. 13 & 30. Knowing the Board had granted final approval to the Goodman Project, he then voted twice to table the vote on final approval of the UA project while UA considered the question of the "impact" fee, despite the Engineer's conclusion that few concerns remained with regard to UA's plans. P. Ex. 21-23 & 36. A reasonable factfinder could conclude that Supervisor Skinner subjected the UA project to heightened scrutiny and purposefully delayed the project's progression in order to obtain the "impact" fee offered by Goodman for the Township.

UA has offered evidence from which a reasonable factfinder could conclude that each of the Board members subjected the UA project to heightened scrutiny and purposefully delayed the project's progression because of the "impact" fee offered by Goodman. If the monetary motive is proved, the defendants acted for improper reasons and their actions constituted a violation of substantive due process. See Parkway Garage, 5 F.3d at 695-96 (if city officials closed a garage in order to increase the value of property owned by the city, the action violated substantive due process); see also Blanche Road v. Bensalem Township, 57 F.3d 253, 269 (3d Cir. 1995). The actual motivation of each supervisor is an issue of fact for the jury to determine. See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991).

III. Was the Constitutional Violation Alleged Clearly Established at the Time it Occurred?

The second prong of the qualified immunity inquiry requires the court to determine if defendants' actions violated a substantive due process right that was clearly established at the time the actions occurred. See Saucier v. Katz, - U.S. -, 121 S.Ct. 2151, 2155-56 (2001). This inquiry ensures that public officials are not held liable for actions they could not have reasonably known were unlawful. See id. at 2156, 2158.

It is insufficient for the right at issue to be clearly established as a general matter at the time of the alleged violation. See Anderson v. Creighton, 483 U.S. 635, 636-37 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640. For an official to be found unprotected by qualified immunity, the law at the time of the alleged violation must have permitted the official to "determine how the relevant legal doctrine . . . [would] apply to the factual situation [he or she was] confront[ing]." Saucier, 121 S.Ct. at 2158.

Here UA alleged that the Board members intentionally delayed the final approval of the UA theater project and subjected the project to heightened scrutiny so that the Township would receive money from the competing project. At the time of the alleged violation, it was clear that "[I]ntentionally . . . imped[ing]

the development of the [UA] project, by ordering that [its] applications be reviewed with greater scrutiny in order to slow down the development," would violate the developer's right to substantive due process. See Blanche Road v. Bensalem Township, 57 F.3d 253, 269 (3d Cir. 1995). It was also clear in 1996 it was unconstitutional for a government official to act out of a desire to obtain money for the Township. See Parkway Garage, 5 F.3d at 695-696.

In Parkway Garage, the plaintiff alleged that city officials abused their authority by closing a structurally sound garage to induce plaintiff to abandon its lease. The city owned the garage property, and the plaintiff alleged that the city officials closed the garage because the property was considerably more valuable to the city unencumbered by plaintiff's lease. Id. at 695. The Court of Appeals found that, if the officials acted out of a desire to increase the monetary value of the property for the city, their actions would violate substantive due process. See id. at 697-98. The allegations in Parkway Garage are closely analogous to plaintiff's allegations here, that the defendants were motivated by a desire to receive a monetary fee for the Township.

The right defendants¹⁰ are alleged to have violated was

¹⁰ The second prong of the qualified immunity test need not be addressed separately for each defendant. Each defendant is alleged to have committed the same wrongful acts. See supra,

clearly established at the time these actions occurred. The cases establishing this right and elaborating its contours were sufficiently similar to the situation faced by defendants that reasonable Board members would have been aware their alleged actions were unconstitutional.¹¹

CONCLUSION

Plaintiff has offered sufficient evidence to permit a factfinder to conclude that the individual Board members subjected UA's plans to heightened scrutiny and intentionally delayed their approval so that the Township would receive an "impact" fee from Goodman, a competing developer. This motive, if proved, was improper and actions taken for this reason constitute a violation of plaintiff's right to substantive due process. The substantive due process right alleged to have been violated by defendants was clearly established at the time their conduct occurred; a reasonable public official would have known that taking official action in order to obtain money for the

II(A) & (B). If the right allegedly violated was clearly established for one member of the Board, it was clearly established for all. See, e.g., Doe v. Delie, No 99-3013, 2001 U.S. App. LEXIS 16059, * 22 (3d Cir. July 19, 2001)(addressing whether the right was clearly established as to all defendants as a group).

¹¹ Recently the Court of Appeals addressed the interaction of the qualified immunity standard with substantive law standards. See Beers-Capitol v. Whetzel, No. 00-2479, 2001 U.S. App. LEXIS 12127, n. 15 (3d Cir. June 11, 2001). The court has taken Beers-Capitol into consideration, but finds its holding inapplicable to the situation here.

municipality would violate a constitutional right. The motion for summary judgment based on qualified immunity will be denied as to each defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DOUGLAS E. SKINNER, WAYNE S. BULLOCK,	:	
and KATHARINE M. WATSON	:	No. 98-5556

ORDER

AND NOW, this 15th day of August, 2001, it is **ORDERED** that defendants' motion for summary judgment based on qualified immunity is **DENIED**.

Norma L. Shapiro, S.J.